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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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JULIE STOTHERS HORNER, as Trustee, etc.,

Plaintiff and Appellant,

v.

JUDGES' RETIREMENT SYSTEM,

Defendant and Respondent.

C084619

(Super. Ct. No.  
34201600202820CUBCGDS)

Plaintiff Julie Stothers Horner's mother received retirement benefits from 1985 when her husband, an active trial judge, died until 2000 when she too passed away. Thirteen years later plaintiff filed a complaint against defendant Judges' Retirement System (JRS) for underpayment of the benefits paid to her mother. Plaintiff lost both the judicial and administrative proceedings. In the underlying lawsuit, she again seeks payment for the increased benefits she still insists her mother should have received, albeit on a different legal theory. The trial court held her claim was barred by the statute of

limitations and res judicata. The court also imposed sanctions on plaintiff's lawyer because he knew or should have known that the complaint and his pleadings defending the complaint were not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (Code Civ. Proc., § 128.7, subd. (b)(2).) We affirm the judgment, including sanctions, but deny defendant's motion for additional sanctions.

## **FACTS**

In 1985 the Honorable Stephen Stothers died before he retired from the bench and before he applied for retirement benefits. JRS paid his pension benefits to his widow, Gloria Stothers, for almost 15 years. Plaintiff is the successor trustee to her mother Gloria's trust.

In July 2013 plaintiff filed a petition for writ of mandate and a complaint for declaratory relief alleging JRS had underpaid her mother's survivor's benefits. After sustaining JRS's demurrer, the trial court entered a judgment of dismissal based on plaintiff's failure to exhaust her administrative remedies. Plaintiff then sought relief before the California Public Employees' Retirement System (CalPERS) Board of Administration. In April 2015 an administrative law judge rejected her claim that JRS failed to credit Judge Stothers with four years of military service credit and failed to properly calculate his wife's survivor's benefits pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532. In June 2015 the CalPERS Board of Administration adopted the decision of the administrative law judge. Plaintiff did not seek timely review by petitioning for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5.

More than a year later, in November 2016, plaintiff filed the present action alleging again that JRS underpaid her mother benefits between 1985 and 2000. In this iteration, plaintiff dropped the military service claim she included in her first lawsuit, reasserted her claim based on *Olson v. Cory, supra*, 27 Cal.3d 532, and asserted a new

claim that JRS failed to inform Judge Stothers about the potential for a higher allowance if he had retired early pursuant to Government Code section 75033.5.

The trial court sustained JRS's demurrer without leave to amend. Citing *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (*Mycogen*), the court held that res judicata precludes "piecemeal litigation by splitting a single cause of action or re-litigation of the same cause of action on a different legal theory for different relief."

The court also awarded JRS \$17,820 in monetary sanctions. The court explained: "Since this Court finds no objectively reasonable attorney would under these circumstances have determined that the claims now alleged in plaintiff's complaint were 'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,' the imposition of monetary sanctions against plaintiff's counsel is justified."

Plaintiff appeals the judgment of dismissal and the monetary sanctions.

## **DISCUSSION**

### **I**

#### ***Res Judicata***

Defendant contends this appeal is barred by well-established principles of res judicata because plaintiff asserted the same primary right in her first unsuccessful lawsuit and is also barred by the statute of limitations because she initiated the second lawsuit 16 years after her alleged right to recovery arose. Because we agree with defendant that this case is barred by res judicata, we need not address the statute of limitations issue.

The essence of the primary right theory is that a plaintiff cannot bring two separate lawsuits to vindicate the same injury. "A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. 'Res judicata precludes piecemeal litigation by splitting a single cause of

action or relitigation of the same cause of action on a different legal theory or for different relief.” ’ [Citation.] A predictable doctrine of res judicata benefits both the parties and the courts because it ‘seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.’ [Citation.]” (*Mycogen, supra*, 28 Cal.4th at p. 897.) The principles of res judicata apply to administrative decisions. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

Plaintiff espouses an unwarranted and narrow view of a primary right. She contends her new assertion that JRS did not inform her father that he was eligible for early retirement does not rest on the same primary right as her earlier theories that her mother’s benefits had been shortchanged. She misunderstands the scope of a primary right.

In *Mycogen*, our Supreme Court reiterated long standing law. “ ‘The primary right theory is a theory of code pleading that has long been followed in California. It provides that a “cause of action” is comprised of a “primary right” of the plaintiff, a corresponding “primary duty” of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] . . .

“ ‘As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.” [Citation.] The primary right must also be distinguished from the *remedy* sought: “The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.” [Citation.]’ ” (*Mycogen, supra*, 28 Cal.4th at p. 904.)

In her 2013 complaint alleging that JRS underpaid her mother between 1985 and 2000, and in the ensuing appeal to the CalPERS Board of Administration, plaintiff asserted two theories: (1) that JRS failed to credit her father with four years of military service credit before he died and (2) that JRS failed to properly apply *Olson v. Cory*, *supra*, 27 Cal.3d 532, to her mother's survivor's benefits. The primary right was to receive the survivor's benefits to which she was entitled.

In the 2016 iteration, she attempts to reframe the cause of action so as to evade the impenetrable obstacle res judicata imposes on split causes of action. She writes: "The initial issues, the underpayment of benefits due to improper COLA [cost of living adjustment] calculations, are not at issue today for want of a timely petition for writ in the superior court. [¶] The only issues before the court today pertain to JRS's non-disclosure, to Judge Stothers, of [Government Code section] 75033.5 as an option for early retirement with correspondingly higher survivor's benefits, the ensuing damages and whether sanctions were appropriate." In both cases, however, the damage sought to be recovered is increased survivor's benefits. The underlying primary right, tied as it is to the harm that has been allegedly suffered, is identical; it is only the theory of recovery that has changed. We agree with JRS that plaintiff's current action seeks redress for the same alleged underpayment of surviving spouse benefits to her mother for the same time period, and therefore, the action is barred by res judicata.

In reply, plaintiff insists that *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294 (*Craig*) compels a different result. Not so. *Craig* presents an entirely different cause of action predicated on a much different primary right. In *Craig*, the plaintiff sought a position as a harbor patrol officer. Throughout years of litigation based on his primary right to secure employment, the plaintiff fought a recalcitrant sheriff who continued to defy court orders to hire him. Ultimately, he prevailed and obtained the position. Only then did he seek damages for the lost income and emotional distress he suffered during the years of torturous litigation. (*Id.* at pp. 1297-1298.)

The court found that *res judicata* did not apply. The court explained: “The mandate proceedings were instituted to enforce appellant’s right to employment as a harbor patrol officer. The issue of past salary or damages was not tendered or considered in that action. Only now, when appellant seeks recovery for the harm which resulted in the respondents’ wrongful conduct, are these issues raised.” (*Craig, supra*, 221 Cal.3d at p. 1302.) Crucial to the analysis in *Craig* is the type of harm suffered. “Further, the type of harm involved in the mandate proceedings are different than the type of wrong in the present case. In the mandate actions, the harm suffered was the denial of the harbor patrol position despite the Commission’s order that he be hired. In this action, the harm suffered included the emotional distress which resulted from respondents’ wrongful conduct.” (*Id.* at pp. 1302-1303.)

In this case, there is no such distinction. When her father died in 1985, plaintiff’s mother was entitled to survivor’s benefits. Plaintiff asserted in her first lawsuit her mother was underpaid. Clearly, the harm was the underpayment of benefits. In the second action, plaintiff makes the same claim, albeit couched in a different legal theory. Although she now alleges JRS failed to inform her father about an attractive option to retire early, the harm suffered remained the same—her mother was denied the full survivor’s benefit to which she was entitled. The trial court properly concluded “plaintiff is now barred by *res judicata* from here attempting to re-litigate the claims presented in the administrative proceedings which concluded in June 2015.”

## II

### *Sanctions*

The trial court imposed \$17,820 in sanctions against plaintiff’s lawyer because it found no objectively reasonable lawyer would have concluded that plaintiff’s complaint was “warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.” (Code Civ.

Proc., § 128.7, subd. (b)(2).) JRS has requested this court to impose an additional \$23,949.90 in sanctions to compensate it for the fees and costs incurred on appeal.

“Code of Civil Procedure section 128.7 imposes a lower threshold for sanctions than is required under Code of Civil Procedure section 128.5. This is because Code of Civil Procedure section 128.7 requires only that the conduct be ‘objectively unreasonable,’ while Code of Civil Procedure section 128.5 also requires ‘a showing of subjective bad faith.’ [Citation.]” (*Guillemín v. Stein* (2002) 104 Cal.App.4th 156, 167.) Importantly, we review the trial court’s award of sanctions for an abuse of discretion. “We presume the trial court’s order is correct and do not substitute our judgment for that of the trial court.” (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 190.)

We cannot say the court abused its discretion. While we see no reason to address the statute of limitations issue here, the trial court found that filing the second lawsuit in 2016, 16 years after the claim arose, was barred by the statute of limitations and by res judicata. Both of these claims were legally frivolous and we agree with the trial court that no reasonable attorney could have objectively determined there was the slightest chance plaintiff would prevail. Since a finding of bad faith is not a prerequisite to an award of sanctions pursuant to Code of Civil Procedure section 128.7, the fact the claims are legally frivolous is sufficient to support the award. Simply put, it is not our role to second guess the trial court, absent a finding of an abuse of discretion.

Yet the imposition of sanctions on appeal should be used sparingly to deter only the most egregious conduct. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261.) The easy case is where there is evidence the appeal was filed for an improper motive. The more difficult case is to distinguish misguided lawyering from an egregious misuse of the appellate process because we certainly do not want to punish a lawyer for full-throated advocacy on behalf of his or her client by raising a novel theory or nudging the development of the law. Here the record is devoid of evidence of bad

faith or an improper motive and yet the frivolousness of the legal claim comes dangerously close to meriting additional sanctions.

Nevertheless, we deny the motion for appellate sanctions for several reasons. First, the arguments, while unpersuasive, were not as totally without merit as JRS contends. After all, the administrative law judge agreed with plaintiff's lawyer that "JRS has not established that the claims were otherwise barred by any applicable statute of limitations." JRS insists that plaintiff's lawyer has ignored *Staniforth v. Judges' Retirement System* (2016) 245 Cal.App.4th 1442 (*Staniforth*), a case that further upholds JRS's position that the claims are barred by the statute of limitations. But plaintiff's lawyer argued below that *Staniforth* was wrongly decided because it misinterpreted *Olson v. Cory, supra*, 27 Cal.3d 532, improperly construed his argument to require calculation of hypothetical earnings, and disregarded the constitutional protection accorded vested retirement benefits. Although ultimately it was unnecessary for us to address any of these arguments because plaintiff's second attempt to recover additional retirement benefits from JRS was barred by res judicata, we cannot say they evidenced bad faith or were so blatantly without merit as to justify appellate sanctions.

Second, plaintiff's lawyer did, in reply, attempt to rebut JRS's argument that the second lawsuit was barred by res judicata. He addressed the primary right theory and offered authority to support his position. Although we have rejected his argument and the applicability of his authority, the standard for imposing sanctions is not ineffective appellate advocacy but an appeal that is utterly without any merit whatsoever. Plaintiff's lawyer's argument is not utterly devoid of a reasonable argument.

Third, we reject the notion that plaintiff's lawyer has attempted to mislead us in seven new ways, as JRS argues in its motion for appellate sanctions. To say that we reject plaintiff's arguments is not to say we believe her lawyer has intentionally tried to mislead us, thereby infusing the prosecution of this appeal with an allegation of bad faith. While it may be difficult to fathom that a claim arising from a judge's death over 33

years ago might still have any viability, we are reluctant to infer bad faith or an improper motive from prosecution of a weak case.

In sum, we uphold the imposition of sanctions awarded by the trial court because Code of Civil Procedure section 128.7 expressly lessens the burden on the moving party than has traditionally been required by Code of Civil Procedure section 128.5 and we can find no abuse of the trial court's discretion. But we deny the motion to impose further sanctions on appeal because the standard is more onerous and we do not find the type of conduct or abject frivolousness to justify yet additional sanctions on appeal.

### **DISPOSITION**

The judgment is affirmed. The motion for appellate sanctions is denied. JRS shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

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RAYE, P. J.

We concur:

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BUTZ, J.

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MAURO, J.